

a **DAMAYANTI KANTILAL DOSHI & ORS**

v.

JIGARLAL KANTILAL DOSHI & ANOR

b HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[ORIGINATING SUMMONS NO: 24-985-1991(1)]
19 JULY 2001

c **CIVIL PROCEDURE:** *Injunction - Ex parte injunction - Discharge - Discharge on grounds of non-disclosure - Failure to make full and frank disclosure - Failure to draw court's attention to material facts - Whether justified immediate discharge of order - Discretion of court - Whether court could continue order or make new order on terms - Rules of High Court 1980, O. 29 r. 1(2B)*

d **CIVIL PROCEDURE:** *Injunction - Setting aside - Setting aside ex parte injunction - Triable issues - Order preventing directors from dealing with company's assets - Whether no real danger that assets would be dissipated - Whether no urgency to move court ex parte - Justice of case - Adequate damages - Whether favouring defendants - Whether injunctive order to be set aside - Rules of High Court 1980, O. 29 r. 1(2B), O. 3 r. 6*

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WORDS & PHRASES: "Must" - Order 3 r. 6 Rules of High Court 1980 - Whether connoting mandatory requirement

f The parties herein were involved in a series of legal disputes over the real and personal properties of the late K.P Doshi. In the instant case, which was filed on 28 November 1991, the first and second plaintiffs ('the plaintiffs') sought for a declaration that they were the rightful directors of the third plaintiff, Overseas Industries Sdn Bhd ('the company'), one of the companies of the late KP Doshi. This case apart, the parties were also involved in JB Civil Suit No. 22-169-1991 ('Suit 169'), JB Civil Suit No. 22-195-1991 ('Suit 195'), JB Originating Summons No. 72-1993 ('OS 72'), JB Originating Summons No. 22-1141-1997 ('OS 1141'), and KL Civil Suit No. 3863-1998 ('Suit 3863') respectively.

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h It was not in dispute that the first defendant ('the defendant') was at all material time the managing director of the company, and that the latter, *inter alia*, had a cash fund of USD 3 million ('the funds') held by asset managers Towry Law Assets and Management Sdn Bhd ('Towry Law'). It was also not in dispute that: (i) by Suit 169, the second plaintiff was restrained by an order of 14 July 1991 from interfering in the management of the company; (ii) by

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Suit 195, the plaintiffs were parties to a consent order dated 1 March 1992 whereby they agreed for that suit to be heard first and be binding on them; (iii) by OS 72, the first plaintiff was restrained by an order of 3 February 1993 from interfering in the management of the company; (iv) by Suit 1141, by order dated on 22 September 2000, the first plaintiff, as executrix to the estate and director of the company, was ruled to have no capacity to interfere in the management of the company; and (v) by Suit 3863, a consent order was recorded on 30 November 1998 requiring Towry Law to safe-keep the funds until further order.

The aforesaid suits and orders notwithstanding, on 17 October 2000, the plaintiffs, without giving any notice to the defendant, applied for and obtained an *ex parte* injunction against the defendant restraining the latter from dealing with the funds. In obtaining the injunctive order, however, the plaintiffs had not fully disclosed to the court about the restraining orders or the consent orders to which they had been subjected. In the subsequent application for a continuation of the *ex parte* order, the defendant argued that the same ought to be set aside as: (i) the plaintiffs were guilty of material non-disclosure; (ii) O. 29 r. 1(2B) Rules of the High Court 1980 ('RHC'), upon its true construction, left the court with no alternative but to set aside the injunction; (iii) the plaintiffs, in failing to give notice of their intention to proceed with the action after a lapse of so many years since the last proceeding, had breached O. 3 r. 6 RHC; and (iv) the plaintiffs were prevented by *res judicata* from obtaining the injunctive order.

The plaintiff argued that there was no material non-disclosure on their part, and that, even if there was, the court had a discretion whether or not to continue the *ex parte* order or make a new order on terms. They further argued that non-compliance with O. 3 r. 6 is a mere irregularity, and that, as directors, they had the necessary *locus* to initiate the action herein.

Held:

- [1] It is incumbent on the plaintiffs in an application of this nature not only to make full disclosures but to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made. The plaintiffs must disclose all facts which reasonably could or would be taken into account by the court in deciding whether or not to grant the application. (p 230 b-d)
- [2] The non-disclosure or lack of disclosure herein amounted to a material non-disclosure as it withheld vital information relating to the question of capacity or *locus* for the court to evaluate at the *ex parte* stage. It is

- a* not sufficient for the plaintiffs to make fleeting references to previous court actions without highlighting its effect. The plaintiffs' duty is to disclose all available information for the court's determination on whether it ought to exercise its discretionary powers. (p 229 h)
- b* [3] The need for a full and frank disclosure at the *ex parte* stage has been enshrined in the rules with the introduction of O. 29 r. 1 (2B) RHC. In the circumstances, whilst there were earlier authorities suggesting that the court has an overriding discretion whether or not to set aside an *ex parte* order obtained without due disclosure, such discretion has been fettered by O. 29 r. 1(2B) RHC. On the facts, the plaintiffs had failed to make
- c* a full and frank disclosure at the *ex parte* stage and had breached the provisions of O. 29 r. 1(2B) RHC. Accordingly, the injunctive order must be set aside. (pp 233 d, h & 235 a)
- d* [4] By reason of the consent order in Suit 3863, the first plaintiff must have known that the funds were never in jeopardy. There was therefore no urgency to move the court *ex parte* in the manner they did herein. The facts of moving the *ex parte* injunction in this court in the face of the consensual freeze order has certainly caused untold embarrassment for both courts which this court is unable to excuse. (p 235 f-g)
- e* [5] The word used in O. 3 r. 6 RHC is "must" in contradistinction with the word "may". That being so, the requirement of O. 3 r. 6 is mandatory in nature and must be complied with. Consequently, a breach of the same is not a mere technical non-compliance of procedural rules amounting to an irregularity. (p 237 c)
- f* [5a] The fact that the *ex parte* injunction herein was sought after almost eight years of inactivity and delay is reason enough for the first plaintiff to comply with the mandatory requirement of O. 3 r. 6 by giving proper notice to the defendants. There was no plausible reason for her not to comply with this order. (pp 237 g-h & 238 d)
- g* [6] The conduct of the first plaintiff in contumeliously ignoring the undertaking given through the consent order in Suit 195 and initiating multiplicity of proceedings involving the same funds in OS 1141 amounted to an abuse of process. By this reason alone, the interlocutory injunction could not be allowed to stand. (pp 238 e & 239 c)
- h*
- i* [7] Issue estoppel as *res judicata* applied in the present case. The order of the Court of Appeal in OS 1141 that the first plaintiff in her capacity as beneficiary of the estate or director of the company had no capacity to interfere in matters concerning the management of the company and

the earlier court order in Suit 195 whereby the court refused to restrain the defendant from managing the assets of the company, had adjudicated and disposed of with finality the issues herein of whether or not the plaintiffs have any say in management matters of the company. (pp 240 g & 241 a-b) a

[8] There were no serious questions to be tried between the parties as the real and underlying dispute lay in Suit 195. This alone would suffice for the court to set aside the injunction. However, even if the court were to embark on questions of ‘justice of the case’ and ‘adequate remedy’, the decision would still be in the defendants’ favour. (p 244 b) b

[Ex parte injunction set aside.] c

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC **(refd)** d

Attorney v. Parson [1956] AC 421 **(refd)**

Bakmawar Sdn Bhd v. Malayan Banking Bhd [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 HC **(foll)**

Belmont Finance Corporation v. William Furniture Ltd & Ors (No 2) [1980] 1 All ER 393 **(refd)**

Brink’s Mat Ltd v. Elcomber [1988] 1 WLR 1350 **(not foll)**

Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors (No 2) 1966 2 All ER 536 **(dist)** e

Castle Fitness Consultancy Pte Ltd v. Manz [1990] 1 MLJ 141 **(foll)**

China Insurance Co Ltd v. Yeong Ah Lam & Anor [1973] 2 MLJ 185 **(refd)**

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC **(not foll)**

Datuk Abu Mansor Mohamed Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor [1982] 1 MLJ 258 **(refd)** f

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC **(refd)**

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA **(refd)**

JH Rayner (Mincing Lane) Ltd & Ors v. Manilal & Sons (M) Sdn Bhd & Anor [1987] 1 MLJ 312 **(refd)** g

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA **(foll)**

Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors [1999] 4 CLJ 726 **(foll)**

Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 MLJ 305 **(refd)** h

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC **(refd)**

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 **(dist)**

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- a** *Lim Oh & Ors v. Allen & Gledhill* [1998] 4 CLJ 667 CA (**refd**)
Lloyds Bowmaker Ltd v. Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 (**refd**)
Mayhew v. Free Grammar School of John Lyon [1991] EGCS 61 (**refd**)
Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA (**refd**)
Re City Equitable Fire Insurance Co Ltd [1925] Ch 407 (**fol**)
- b** *Schlieske v. Minister for Immigration & Ethnic Affairs (G324 of 1987) Schlieske v. Robilliard (G361 of 1987)* [1988] 79 ALR 554 (**refd**)
Shell Chemicals UK v. Vinamul (formerly Vinyl Products) [1991] 135 SJ 412 (**refd**)
Siporex Trade SA v. Comdel Commodities Ltd [1986] 2 Lloyd's Law Reports 428 (**fol**)
- c** *Stempt v. Griffin* [1988] STC 47 (**refd**)
Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC (**not fol**)
Tenaga Nasional Berhad v. Prorak Sdn Bhd [2000] 1 CLJ 553 CA (**refd**)
Tunas Pte Ltd v. Maju Investment Pte Ltd [1989] 2 MLJ 132 (**refd**)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok [1975] 2 MLJ 109
- d** (**refd**)
- Legislation referred to:**
 Finance Act 1971, s. 23(2)
 Rules of the High Court 1980, O. 3 r. 6, O. 29 r. 1(2B)
 Rules of the Supreme Court 1957, O. 18 r. 8(1), O. 64 r. 13
- e** Housing Act 1974 [UK], sch 8, para 2(3)
- Other source(s) referred to:**
Britannica World Language Edition of the Oxford Dictionary, vol 1, pt 1
Stroud's Judicial Dictionary of Words and Phrases, 6th edn, vol 2, p 1653
- f** *For the 1st plaintiff - David Morais (Khabir Dhillon); M/s M David Morais*
For the 2nd plaintiff - Danaraj (Mathews George); M/s Danaraj Mathews Jimmy & Sara
For the 1st defendant - RR Mahendran; M/s RR Mahendran & Co
For the 2nd defendant - Steven Thiru; M/s Shook Lin & Bok
- g** Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

- h** There are two applications before this court in respect of the aforesaid action - namely encl. 14 which is the 1st and 2nd plaintiff's application on an *inter parte* basis for the continuation of the *ex parte* injunction order dated 25 October 2000 as varied by the Order dated 25 October 2000 and encl. 24 which is the 1st defendant's application to set aside the *ex parte* order dated 17 October 2000 as varied by the Order dated 25 October 2000 aforesaid.
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The *ex parte* injunction granted by the court on 17 October 2000 and varied on 25 October 2000 was essentially to restrain the 1st defendant, who is the managing director of the 3rd plaintiffs from dealing in any manner the assets and funds held by Towry Law Asset Management Sdn Bhd estimated at USD3,000,000. *a*

The application herein is another episode of the continuing and rather tragic saga of protracted and acrimonious family dispute over the real and personal properties of the late Kontilal Prabhulal Doshi also known as KP Doshi. *b*

The originating summons herein relates to the seeking of declaratory reliefs by the 1st and 2nd plaintiffs that they are the rightful directors of the 3rd plaintiffs and is part of a series of several legal suits involving the 1st and 2nd plaintiffs herein on one side and the 1st defendant herein on the opposing side. Amongst the other related actions are: *c*

1. JB Civil Suit No. 22-169-1991

Suit by the 1st defendant against the 2nd plaintiff and Jogesh (youngest son of the 1st plaintiff) for declaration that he is the true and legal beneficial owner of the shares registered in his name with the 3rd plaintiff and injunctive reliefs obtained for surrenders of the keys to 3rd plaintiffs' premises and documents relating to its affairs and restraining 2nd plaintiff and Jogesh from holding themselves out as directors and inter-meddling with affairs of company. *d*

2. JB Civil Suit No. 22-195-1991

Suit by 1st plaintiff and Jogesh as plaintiffs against 1st and 2nd defendants and 3rd plaintiff as defendants. Action by 1st plaintiff and Jogesh in their capacity as executor and executrix challenging 1st and 2nd defendants' appointment as directors of 3rd plaintiff and declaration that the shares in the 1st defendant's name in 3rd plaintiff is held in trust for the benefit of the estate. *e*

3. JB High Court O.S. 24-1066-1991 – suit by 1st plaintiff and Jogesh as executors against 1st defendant in respect of 1st defendants dealings with the assets of Tino Industries which was a partnership between 1st defendant and the late Doshi. *f*

4. S.P. 72 of 1993 – whereby 1st plaintiff was under restraining order dated 3 February 1993 from interfering in the management and affairs of 3rd plaintiff company including its assets. *g*

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- a* 5. Originating Motion No. 25-32-1994 in JB High Court – application by 1st and 2nd defendant together with 3rd plaintiff for the removal of 1st plaintiff and Jogesh as executors and executrix and High Court granted order for removal on 29 July 1995 and appeal dismissed by Court of Appeal on 11 August 1998 and Amanah Raya Bhd substituted as administrators.
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- c* 6. On 25 November 1997 O.S. 22-1141-1997 was filed in JB High Court by 1st defendant in the name of the 3rd plaintiff against Towry Law Asset Management Sdn Bhd (formerly known as Matheson PFC Asset Management Sdn Bhd) praying for the release of the investment funds with Towry Law. 1st plaintiff and Jogesh applied to intervene in their capacity as executors and beneficiaries which was allowed by the court on 28 February 1998. However the decision was reversed by the Court of Appeal on 27 September 2000 on the ground that since both have been removed as executors, as beneficiaries of an unascertained residuary estate they do not have legal interest and have no *locus* to intervene.
- d*
7. S.P. 1189 of 1997 – Plaintiff and Jogesh sought order preventing Towry Law from releasing funds.
- e* 8. On 21 October 1998 another action based on negligence against Towry Law was filed in KL High Court 22-3763-1998 by 1st defendant in the name of the 3rd plaintiff requesting for a release of the investment funds. 1st plaintiff and Jogesh applied to intervene and pending order for intervention, consent order was entered on 30 November 1998 whereupon the investment fund was liquidated into US Dollars and to be placed in interest bearing account in Towry Law's name. Court allowed the intervention on 24 May 2000 in their capacity as beneficiaries and the appeal has yet to be heard.
- f*

g It is to be observed that as the parties intended to facilitate early disposal of the various suits in the Johor Bahru courts they accordingly recorded a consent order in Suit 195 setting it down for trial and that suit 169 and O.S. 985 will abide by the decision in Suit 195.

h In the course of my judgment herein I shall invariably advert to some of the related actions aforesaid which has direct relevance to the issues raised herein and which is the basis of my reasoning in the judgment herein.

i The undisputed facts herein are that the 1st and 2nd plaintiffs and the 1st defendant are all members of the Doshi family – the 1st plaintiff is the mother and the 2nd plaintiff and the 1st defendant are her sons, whilst the 2nd defendant is the wife of the 1st defendant and hence the daughter-in-law

of the 1st plaintiff. The 3rd plaintiff is one of the companies of the late Doshi and the 1st defendant is the managing director who together with two other nominees make up the board of directors of the 3rd plaintiff. *a*

The subject matter of the injunction herein, namely the US\$3 million which is currently held by Towry Law is the most liquid asset of the 3rd plaintiff company. *b*

The defendants' opposition to the plaintiffs' application for injunction can be broadly categorised under four headings.

Material Non-disclosure

The main ground relied upon by the defendants under this head was the failure by the plaintiff to disclose the restraining order dated 3 February 1993 made in Saman Pemula No. 72 of 1993 where the plaintiffs were restrained from interfering with the management and affairs of the 3rd plaintiff company and by extension it is contended includes the assets and funds of the 3rd plaintiff company. A similar restraining order was also obtained against the 2nd plaintiff on 14 July 1991 in Suit No. 22-169-1991. The two orders aforesaid exhibited in JKD-1 and JKD-3 of encl. 23 are reproduced hereunder: *c*

"JKD-1"

**IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU
IN THE STATE OF JOHORE, MALAYSIA
ORIGINATING SUMMONS NO. 72 OF 1993**

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In the matter of Overseas Industries Sdn Bhd and Tino Industries Sdn Bhd

1. SHOBHANA JIGARLAL DOSHI *f*
2. JIGARLAL KANTILAL DOSHI
3. OVERSEAS INDUSTRIES SDN BHD
4. TINO INDUSTRIES SDN BHD ... PLAINTIFFS

AND

1. DAMAYANTI KANTILAL DOSHI *g*
2. VALLIVEL A/L RONNAM
3. KALU NAIR ... DEFENDANTS

BEFORE THE HONOURABLE MR. JUSTICE HAIDAR BIN MOHD NOOR
HIGH COURT OF MALAYA IN CHAMBERS *h*
JOHOR BAHRU, JOHOR THIS 3RD DAY FEBRUARY 1993

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*a***ORDER**

UPON the application on the part of the abovenamed Plaintiffs by way of Summons in Chambers dated 3rd day of February 1993 coming on for hearing 3rd day of February 1993 in the presence of Mr. Kuthubul Zaman Bukhari of counsel for the Plaintiffs **AND UPON READING** the summons in chambers with the Affidavit of Shobhana J. Doshi dated the 3rd day of February and **UPON HEARING** the counsel for the plaintiffs as aforesaid and by the said undertaking to abide by any order the court or Judge may make as to damages in case the court or a Judge should hereafter be of opinion that the Defendants shall have sustained any by reason of this order which the Plaintiff ought to pay **IT IS HEREBY ORDERED** as follows:

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- a) That the 1st, 2nd and 3rd Defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from remaining in the premises and continuing to occupy the premises of the 3rd Plaintiff, Overseas Industries Sdn. Bhd. and 4th Plaintiff, Tino Industries Sdn. Bhd.

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- b) That the 1st Plaintiff be allowed to enter the premises of No. 9, Jalan Tara, Tampoi, Johor and continue in the management and operation of the 3rd & 4th Plaintiff's Companies.

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- c) That the 1st, 2nd and 3rd Defendants be restrained whether by themselves or their servants or agents from removing any books, document and files from the premises of No. 9, Jalan Tara, Tampoi, Johor Bahru.

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- d) That the 2nd and 3rd Defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from acting or holding themselves, as Executive Officer or Assistant Executive Officer of 3rd Plaintiff, Overseas Industries Sdn Bhd.

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- e) That the 1st, 2nd and 3rd Defendants or their servants or agents do deliver forthwith all books, files, and documents taken out from the premises of Overseas Industries Sdn Bhd and Tino Industries Sdn Bhd.

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- f) That the 1st, 2nd and 3rd Defendants remove all guards from the premises, No. 9, Jalan Tara, Tampoi, Johor Bahru and allow the Plaintiffs, their servants and agents access to the said premises.

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- g) That the 1st, 2nd and 3rd Defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from managing the affairs of 3rd Plaintiff, Overseas Industries Sdn Bhd and 4th Plaintiff, Tino Industries Sdn Bhd, entering into commitments, contracts, arrangements of any nature whatsoever, dealing with any of the banks accounts, fixed deposit accounts, investment accounts or any assets of 3rd Plaintiff, Overseas Industries Sdn Bhd and 4th Plaintiff, Tino Industries Sdn Bhd moveable or immovable or of whatsoever nature of the 3rd and 4th Plaintiff's companies, until further order.

AND IT IS LASTLY ORDERED that the Defendants are at liberty to set aside the above orders within fourteen days from the date of service of this order.

Dated this 3rd day of February 1993

...
Senior Assistant Registrar
High Court of Malaya
Johor Bahru

This order is filed by M/s Zaman & Associates of Suite 502, 5th Floor, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru.

“JKD-3”

**DALAM MAHKAMAH TINGGI MALAYA AT JOHOR BAHRU
DALAM NEGERI JOHOR, MALAYSIA**

GUAMAN SIBIL NO. 22-169 TAHUN 1991

ANTARA

JIGARLAL KANTILAL DOSHI ... PLAINTIF

DAN

1. JOGESH KANTILAL DOSHI
2. TIKAKLAL KANTILAL DOSHI

...DEFENDAN

DI HADAPAN YANG ARIF, DATUK L C VOHRAH DALAM KAMAR
HAKIM, MAHKAMAH TINGGI MALAYA
JOHOR BAHRU, JOHOR PADA 14 HARIBULAN JULAI 1991

PERINTAH

ATAS permohonan bagi pihak Plaintiff melalui Saman Dalam Kamar Catatan No. 632/91 bertarikh 14 haribulan Julai 1991 yang telah didengar pada hari ini di dalam kehadiran Encik Kuthubul Zaman Bukahri Peguam bagi Plaintiff **DAN SETELAH** membaca Saman Dalam Kamar serta Afidavit Encik Jigarlal Kantilal Doshi yang diperakui pada 12hb Julai 1991 dan difailkan pada 14hb Julai 1991 dan setelah **MENDENGAR** Peguam bagi Plaintiff dan Plaintiff oleh Peguamnya yang tersebut mengakui untuk mematuhi dengan apa-apa perintah yang dibuat oleh Mahkamah atau Hakim tentang gantirugi kiranya Mahkamah atau Hakim berpendapat selepas itu yang Defendan-Defendan telah ditanggung apa-apa disebabkan perintah ini yang Plaintiff patut bayar **ADALAH DI**

- a** **PERINTAHKAN** dan diarahkan bahawa Defendan Pertama dan Kedua hendaklah membuat penyerahan serta-merta kepada Plaintiff kunci-kunci premis kilang iaitu No. 9, Jalan Tara, Tampoi, Johor Bahru berserta kesemua kunci-kunci peti-peti berkunci, kabinet dan bilik kawalan ketat, dan kesemua dokumen-dokumen, buku-buku cek, penyata-penyata bank, harta benda syarikat
- b** **DIPERINTAHKAN SELANJUTNYA** bahawa Defendan Pertama dan Kedua dihalang sama ada atas diri mereka masing-masing atau penggaji-penggaji atau ejen-ejen atau sebagaimana jua dari bertindak atau menggapai diri mereka sebagai Pengarah-Pengarah atau Pengurus-Pengurus atau Setiausaha-Setiausaha atau Pegawai-Pegawai syarikat iaitu Overseas Industries Sdn Bhd sehingga
- c** perbicaraan tindakan ini atau sehingga perintah lanjut **DIPERINTAHKAN SELANJUTNYA** bahawa Defendan Pertama dan Kedua dihalang sama ada atas diri mereka masing-masing atau penggaji mereka atau ejen-ejen atau sebagaimana jua dari mengurus campur dalam perniagaan atau pengurusan urusan-urusan syarikat iaitu Overseas Industries Sdn Bhd sehingga perbicaraan tindakan guaman ini atau sehingga perintah lanjut **DAN DIPERINTAHKAN**
- d** **AKHIRNYA** bahawa Defendan Pertama dan Kedua diberi kebebasan untuk memohon untuk mengenenipkan perintah ini dalam tempoh 14 hari dari tarikh penerimaan Perintah ini.

Bertarikh pada 14 haribulan Julai 1991.

- e** ...
 Penolong Kanan Pendaftar
 Mahkamah Tinggi, Malaya
 Johor Bahru

- f** It is the defendants' submission that the cumulative effect of the non-disclosure of the two orders aforesaid amounts to material non-disclosure in that it goes to the root of the 1st and 2nd plaintiff's capacity to proceed with the injunctive application and the orders remains valid and binding as they have not been varied or set aside. In support of their contention the defendants relied on *Tunas Pte Ltd v. Maju Investment Pte Ltd* [1989] 2 MLJ 132 and *Siporex Trade SA v. Comdel Commodities Ltd* [1986] Lloyd's Law Reports (vol. 2) 428.

- g** The plaintiffs dispute that there was non-disclosure and submit that all relevant disclosures have been made by the plaintiffs in their affidavit in support for *ex parte* injunctive relief in encl. 13 particularly in paras. 5, 6, 7 and 8 thereof. The plaintiffs further submit that even if there was non-disclosure it was not
- h** material bearing in mind that the 1st plaintiff is moving the court in her capacity as director in which capacity there has not been any impediment of any restraining orders in any of the previous suits disclosed or otherwise. The plaintiff's strenuously submit that what matters most, even if material non-disclosure exists is the consequence of non-disclosure as there was no
- i** absolute right to set aside an *ex parte* order obtained by non-disclosure – the

discretion is still with the court founded on the test of justice and in support thereof relies on the cases of *Brink's Mat Ltd v. Elcomber* [1988] 1 WLR 1350 and *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74.

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In reply the defendants submit that in the light of the introduction of O. 29 r. 1(2B) in the Rules of the High Court 1980 the rationale in *Brink's Mat's* case is no longer relevant in an *ex parte* situation. The defendants reiterate and allude to the case of *Siporex Trade SA v. Comdel Commodities Ltd* [1986] Lloyd's Law Reports vol. 2 p. 428 in that once there is non-disclosure the injunction cannot be granted and/or sustained even if there are serious questions to be tried.

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On the 1st plaintiff's contention that she is moving the court in her capacity as director, the defendants in relying on the case of *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 countered that a director having no interest in the assets cannot have the capacity to move the court for a restraining order.

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In determining the non-disclosure issue it is imperative to emphasise that the determiner of what is material for disclosure is the court and not the parties. Turning to the evidence in this case I have scrutinised the affidavits filed by the 1st plaintiff and nowhere was there any disclosure of Saman Pemula No. 72 of 1993 and particularly the restraining order dated 3 February 1993 restraining the 1st plaintiff from interfering with the affairs of the 3rd plaintiff prior to the application for injunction. The 1st plaintiff only disclosed the order in her 2nd affidavit of 24 October 2000 in encl. 24 which was after the defendants' application to set aside the order. As regards Suit No. 22-169-1991 though disclosure was made by the 1st plaintiff in her affidavit in encl. 13 nevertheless the 1st and 2nd plaintiffs failed to direct the court's attention to the scope and effect of the order dated 14 July 1991 made therein particularly the restraining order restraining the 2nd plaintiff from interfering with the management of the 3rd plaintiff. Again in respect of the order dated 17 August 1991 made in J.B. High Court Civil Suit No. 22-195-1991 and exhibited as DKD-2A in encl. 13 the plaintiff failed to draw the court's attention to the effect of the order.

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It is my considered view that the non-disclosure or lack of disclosure as such amounts to a material non-disclosure as it withholds vital information relating to the question of capacity or *locus* for the court to evaluate at the *ex parte* stage. It is not sufficient for the plaintiffs to make fleeting references to previous court actions without highlighting its effect. The plaintiffs' duty is to disclose all available information for the courts' determination on whether it ought to

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- a* exercise its discretionary powers. As was stated by Her Ladyship Siti Norma Yaakob J (as she then was) in *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1991] 3 CLJ 1759; ([1991] 2 CLJ (Rep) 323) at p. 1761 (p. 326):

b It is true that the defendant's letter was exhibited to the plaintiff's *ex parte* application but it is incumbent upon the Plaintiff on an *ex parte* application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the Court into making an order that it would not have necessarily made. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiff's account, I would not have granted the order.

c In *Bakmawar's* case her Ladyship discharged the *ex parte* injunction on the ground that the court's attention was not drawn to a material fact even though evidence of that fact was disclosed in the annexure to the affidavit.

d Earlier in the case of *Castle Fitness Consultancy Pte Ltd v. Manz* [1990] 1 MLJ 141, the court stated that where an *ex parte* application is made, the plaintiff is not only obliged not to mislead the court but in addition he is under a duty to disclose to the court all matters that are within his knowledge which are material to the proceedings and which are or may be in favour of an absent party. A matter is regarded as material if it is a factor that the court will take into account in the exercise of its discretion.

e Having established that there are material non-disclosures on the part of the plaintiffs herein I shall now proceed to address the plaintiffs' argument that the court is endowed with discretion to rule otherwise if justice dictates as the emphasis should be on the consequence of non-disclosure rather than the non-disclosure itself. On the question of the court's discretion it is necessary to ascertain the principles established in *Brink's Mat Ltd v. Elcomber* [1988] 1 WLR 1350 and *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 cited by the plaintiffs.

f In *Brink's Mat's* case the English Court of Appeal held that the court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms. Ralph Gibson LJ laid down the principles to be applied in determining non-disclosure:

g In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v.*

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Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1997] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not be the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v. Jarvie* [1850] 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v. Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v. Robinson* [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v. Nikpour* [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains ... an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...': see *Bank Mellat v. Nikpour* (at 91) per Donaldson LJ, citing Warrington LJ in the *Kensington Income Tax Comrs* case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded': see *Bank Mellat v. Nikpour* [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms:

... when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

(See *Lloyds Bowmaker Ltd v. Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 at 183 per Glidewell LJ).

- a* Again in the case of *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; ([1991] 4 CLJ (Rep) 74) the High Court exercised its discretion not to set aside the *ex parte* injunction even though there was non-disclosure. His Lordship Edgar Joseph Jr J (as his Lordship then was) stated at p. 1888 (p. 82):
- b* I would add that even had I been made aware of the receipt by the first plaintiff on 3 March 1990 of a formal notice of the intended meeting of Dragon's board on 6 March 1990, I would still have granted the injunction because I do not, for the reasons stated, consider the omission of sufficient weight.
- c* Before concluding my views regarding this part of the case, I consider it desirable to briefly state the current attitude of the courts when dealing with applications for discharge of *ex parte* orders on the ground of non-disclosure. It is succinctly set out in the following passage in the judgment of Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd*:
- d*
- e* I will deal first with the application to set aside the *ex parte* order. It is a basic principle, applicable to all *ex parte* applications, that a plaintiff seeking *ex parte* relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the *ex parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court *inter partes*, justice requires an order either continuing the *ex parte* injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex parte* order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not.
- f*
- g* From the aforesaid cases it cannot be denied that the court has an overriding discretion whether or not to set aside an *ex parte* order obtained without due disclosure but as is implicit it must be founded on judicial principles which invariably necessitates the court to evaluate *inter alia* the materiality and importance of the non-disclosure.
- h* The importance and materiality of any fact is a question of fact to be decided by the court and the exercise of the courts' discretion can only be embarked upon if the applicant has made frank and full disclosures of all material facts - that was the principle established by the Supreme Court in *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; ([1989] 1 CLJ (Rep) 22). His Lordship Mohamed Azmi SCJ at p. 96 (p. 25) stated the principle as follows:
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Further, in presenting affidavit evidence to establish the necessary ingredients for an *ex parte* order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *ex parte* application would invariably be fatal. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd v. Data Mante (M) Sdn Bhd & Ors* on the applicability of the principle of frank and full disclosures in all *ex parte* applications for Mareva injunctions.

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Thus from the principles aforesaid the degree of importance of the facts not disclosed (as determined by the court) is an important factor in the exercise of the courts' discretion whether or not to set aside the *ex parte* order – the higher the degree of importance of the fact not disclosed the lesser would be the courts' discretion in maintaining the injunction.

c

In any event with the introduction of O. 29 r. 1(2B) of the Rules of the High Court 1980 the need for full and frank disclosure at the *ex parte* stage has been enshrined in the rules which invariably fetters the court's discretion.

d

Support for the fetter on the court's discretion in respect of non-disclosure at the *ex parte* stage is found in the case of *Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors* [1999] 4 CLJ 726 and I associate myself with the views expressed by Justice Dato' RK Nathan at p. 730 thereof where he stated:

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From these cases and more so from the decision in *Brink's Mat's* it can be gathered that the principles applicable to a non-disclosure case is that the court will first decide whether there was material non-disclosure justifying a setting aside of the *ex parte* order. As said by Ralph Gibson LJ at p. 1356 "the material facts are those which it is material for the judge to know in dealing with the application as made;". Only then does the discretion arise to nonetheless continue the *ex parte* injunction or to set it aside and grant a fresh injunction. The discretion to continue the *ex parte* injunction only arises because there is a discretion to grant a fresh one. In the circumstances, when the need to exercise this discretion arises it will be governed by whether the non-disclosure was innocent and whether the injunction would have been granted if the non-disclosed facts had indeed been disclosed.

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However, it is my judgment that this discretion does not now arise in the light of O. 29 r. 1(2B) of the RHC. The effect of this amendment to O. 29 is that the court will look purely as to whether there has been a non-disclosure of material facts in line with the decision in *Creative Furnishing*. The earlier principle that whether in all the facts now before the court including the previously non-disclosed facts the court might be minded to grant the injunction is no longer of relevance. That to my mind, would become relevant only when

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- a* it comes to the plaintiffs' *inter partes* application for an interlocutory injunction. This was the approach I adopted in *Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* [1997] 5 CLJ 307. This is what I said at p. 328:
- ... Order 29 r. 1(2A) of the RHC 1980 was introduced for a specific purpose and with specific reference to *ex parte* applications. The need for full and frank disclosure at the *ex parte* stage has now been enshrined in the rules. Such rules cannot be treated as mere pedantic verbiage. They must be strictly complied with by the parties and enforced by the court. It is my finding that the plaintiffs had indeed breached this rule.
- b*
- c* In the light of our O. 29 r. 1(2B) I must express my reservation and doubt, whether the principle established in *Brink's Mat's* case concerning the discretion point can and should be applied or followed by our courts. The same reasoning would also apply to *Tan Guan Eng's* case bearing in mind that the case was decided prior to the introduction of O. 29 r. 1(2B) Rules of the High Court 1980.
- d* The position as it stands now in respect of the principles applicable concerning disclosure is similar to the position existing in *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Law Reports 428 where the principle was adequately laid out at p. 437.
- e* The scope of the duty of disclosure of a party applying *ex parte* for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v. The Kensington Income Tax Commissioners*, [1971] 1 K.B. 486; *Thermax Ltd. v. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289; *Wardle Fabrics Ltd. v. G. Myristis Ltd.*, [1984] F.S.R. 263; *Bank Mellat v Nikpour*, [1985] F.S.R. 87. The other principles have not been the subject of detailed challenge.
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- g*
- h*
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Thus to summarise the position since the plaintiffs have failed to make a full and frank disclosure at the *ex parte* stage they have breached the provisions of O. 29 r. 1(2B) Rules of the High Court 1980 and the court is accordingly justified in setting aside the injunctive order obtained which is amply supported by the evidence herein. The evidence adduced clearly shows not only the failure to disclose 14 July 1991 order at the *ex parte* stage but also the disclosure too late in the day of the order dated 3 February 1993 in Saman Pemula No. 72 of 1993 – the same being disclosed after the application to set aside the order was made. It is a basic principle of the law of injunctions that fresh evidence which was not before the court at the *ex parte* stage, cannot be introduced for purposes of the *inter partes* application to remedy the error made in the *ex parte* application or to bolster the *ex parte* order – *Datuk Abu Mansor Mohamed Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor* [1982] 1 MLJ 258 at p. 260.

For the sake of completeness I would also touch on the plaintiff's contention that the plaintiff's application was based and prompted by the 1st defendant's correspondence with Towry Law exhibited as exhs. DKD6 and DKD7 in encl. 13. In essence the correspondence relates to the request for release of the sum of USD 500,000 by the 3rd plaintiff from Towry Law arising from the Appeal Court decision made on 27 September 2000 in Originating Summons 1141 of 1997. It is interesting to note that in the reply by Towry Law's solicitors in DKD8 they refused to accommodate the 3rd plaintiff's request unless a court order was obtained. This refusal was predicated by the earlier consent order in Suit No. 22-3863-1998 which subjects Towry Law to hold the monies pending further order.

By reason of the consent order in Suite 3863-1998 above not only is there no urgency to move the court *ex parte* in the manner they did but more importantly their own indolence and lack of vigilance (to put it mildly) in not moving the court for variation of the order or even moving the court for an injunction restraining the release of the funds. The act of moving the *ex parte* injunction in this court in the face of the consensual freeze order in the KL High Court is causing untold embarrassment for both courts for which this court is unable to excuse.

The conduct of the plaintiffs become all the more grave when they blatantly attempted to ignore their own undertaking given to this court under the consent order dated 17 August 1991 in Suit No. 22-195-1991 for the suit to be heard first and the decision binding the action herein.

a Non-compliance With O. 3 r. 6 Rules Of The High Court 1980 And Abuse Of Process.

Order 3 r. 6 Rules of the High Court 1980 reads as follows:

b Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

A summons on which no order was made is not a proceeding for the purpose of this rule.

c It is the defendants' submission that the last proceeding in this action was either when the action was filed *ie*, on 28 November 1991 or when the consent order in JB High Court Suit No. 22-195-1991 was entered on 1 March 1992. In either case there has been a lapse of more than one year since the last proceeding in this action and accordingly the plaintiffs were obliged to give notice of intention to proceed before moving for the *ex parte* injunction on 17 October 2000. Since the requirement of the rule is mandatory failure to comply warrants a setting aside or striking off of the action and relies on the case of *China Insurance Co Ltd v. Yeong Ah Lam & Anor* [1973] 2 MLJ 185 which was approved by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.

e The plaintiffs' submission on this point is that the rule must be interpreted liberally – the rule cannot apply to Mareva injunction or Anton Piller orders because by definition and the requirement of secrecy and speed you have to go *ex parte*. The plaintiffs further submit that even if there is requirement to comply, non-compliance is a mere irregularity and the court has a wide discretion to remedy such an irregularity and relies on the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 2 CLJ 305.

g The word “must” was held in *Attorney v. Parson* [1956] AC 421 as being imperative which admits no discretion just like the word “shall”. In *Britannica World Language Edition of the Oxford Dictionary* vol. 1 Pt. 1 defines the word “must” to mean “expressing necessity; obliged or required to”. The *Concise Oxford Dictionary* 9th edn, Thumb Index Edition defines the word “must” to mean “be obliged, be certain to; ought to; expressing insistence.”

h In *Stroud's Judicial Dictionary of Words and Phrases* vol. 2 (6th edn) at p. 1653 the word “must” was defined as follows:

“Must be made” (Finance Act 1971 (c. 68), s. 23(2)). As used in this section “must” is mandatory and not merely directory (word - *Stempt v. Griffin* [1988] STC 47).

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The requirement in Rules of the Supreme Court 1957 O. 18 r. 8(1) that in any pleading subsequent to a statement of claim a party “must” specifically plead any matter showing ‘illegality, is mandatory (*Shell Chemicals UK v. Vinamul (formerly Vinyl Products)* [1991] 135 SJ 412). a

Application ... must be made within six weeks (Housing Act 1974) (c. 44) Sched 8 para. 2(3) “must” is mandatory, so that a tenant who was out of time, and was refused an extension of time by the county court, could not initiate the procedure over again by serving a second notice (*Mayhew v. Free Grammar School of John Lyon* [1991] EGCS 61). b

Upon appraising the definition of the word “must” as found in the dictionaries aforesaid and the language used by O. 3 r. 6 Rules of the High Court 1980 it is my considered view that it is mandatory in nature. The word used is “must” in contradistinction with the word “may” and hence the mandatory effect and not merely directory – it becomes one of necessity and obligatory. c

In *China Insurance Co Ltd v. Yeong Ah Lam & Anor* his Lordship Syed Othman J (as he then was) set aside the notice of trial given some 23 months after the delivery of defence. d

His Lordship in that case in construing O. 64 r. 13 of the Rules of the Supreme Court 1957 (which is in *pari materia* with O. 3 r. 6 of the present Rules) observed that the non-compliance with the rule does not render the proceedings void and as such does not warrant the striking out of the whole action but only the notice of trial. e

In *Ng Hee Thoong v. Public Bank Bhd* [1995] 1 CLJ 609 Gopal Sri Ram JCA was of the view that a defendant in defending an application for summary judgment is well within his rights to raise and rely upon the non-compliance by the plaintiff of O. 3 r. 6. f

Turning to the case at hand though I would agree that secrecy and speed is the essence in injunctive relief nevertheless the facts of this case clearly negative any element of necessity to act with secrecy and speed. The subject matter of the funds over which the restraining order is operative was in no danger of being dissipated or placed in jeopardy by reason of the fact that the consent order of 30 November 1998 made in Suit No. 3863-98 had frozen the funds. The 1st plaintiff was a party to the consent order and accordingly she knew for a fact that the funds were never in jeopardy so long as the consent order is not set aside or varied. That being the case I cannot see any plausible reason for her not to comply with the requirements of O. 3 r. 6 and hence I am amply justified in concluding that a breach of same in the factual matrix of this case g
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- a* cannot be termed a mere technical non-compliance of procedural rules amounting to an irregularity. As was stated by His Lordship Gopal Sri Ram JCA in *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305 at p. 319:

- b* It is wrong to assume that the Court is obliged in every case to overlook the breach of a rule of Court. For that would mean that a litigant may honour the Rules of the High Court more by breach rather than by observance. This is certainly not the law.

- c* In essence the notice required under O. 3 r. 6 is to prevent a slumbering plaintiff from taking advantage of his indolence without first giving notice to the defendant. The rationale behind the rule is obvious in that the defendant should not only not be taken by surprise but also should be given early opportunity to protect his interest upon notice being given. It is in short a rule of essential justice and fairness.

- d* The fact that an *ex parte* injunction was sought after almost eight years of inactivity and delay is reason enough for the plaintiffs to comply with the mandatory requirements of the rule. The delay here is coupled with abuse of process the cumulative effect of which takes it out of the ambit of irregularity.

- e* The conduct of the 1st plaintiff in contumeliously ignoring the undertaking given through the consent order dated 1 March 1992 in JB High Court Civil Suit No. 195 of 1991 and initiating multiplicity of proceedings involving the same funds in KL Civil Suit No. 3863-1998 and JB High Court O.S. No. 1141 of 1997 can only be described as an abuse of process.

- f* The conduct of the plaintiffs herein is akin to the conduct of the respondent in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 where the respondent instituted multiplicity of proceedings in respect of the same subject matter in the Penang High Court and Shah Alam High Court. The Court of Appeal in laying down the various circumstances in which the court's process may be abused held that the intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch clearly smacks of abuse.

- g* The Court of Appeal propounded that the circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed.

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The Court of Appeal in clear and unambiguous language held that abuse of process would include the use of interlocutory relief as an instrument of oppression. It is plainly an abuse of the courts' process where the relief at law or in equity is used not to remedy a genuine grievance but as an instrument of oppression.

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Again in *JH Rayner (Mincing Lane) Ltd & Ors v. Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312 where there was duplicity of proceedings in London and Kuala Lumpur over the same subject matter, the court held that it amounted to an abuse of process and stayed the KL proceedings as well as dissolving the injunction granted.

b

Applying the principles established aforesaid it is my finding that the conduct of the 1st plaintiff in instituting several proceedings in both the Johor Bahru and Kuala Lumpur High Court in respect of the same subject matter smacks of one of the worst cases of abuse of process and by reason thereof the interlocutory injunction herein cannot be allowed to stand.

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Res Judicata

The defendants' complaint under this head is that the principles of *res judicata* prevents the 1st and 2nd plaintiffs herein from making and obtaining the injunctive order herein as they had earlier failed to obtain an injunctive order in Suit 195 of 1991 to restrain the 3rd plaintiff company and further the Court of Appeal in O.S. No. 1141 of 1997 had on 22 September 2000 decided on the issue of the 1st plaintiff having no interest whatsoever in the Towry Law funds. The cumulative effect of the two orders made in the above suits, it is submitted are final orders on the issue of whether or not the plaintiffs have any say in management matters of the 3rd plaintiff and as such are final and binding unless and until reversed on appeal and in support thereof relies on *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; *Tenaga Nasional Berhad v. Prorak Sdn Bhd* [2000] 1 CLJ 553;

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The plaintiffs in opposing the *res judicata* argument submits that for *res judicata* to apply there must be a final judgment – *Carl Zeiss Stifting v. Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 and if there is no final decision there can be no estoppel – *Schlieske v. Minister for Immigration & Ethnic Affairs (G324 of 1987)* *Schlieske v. Robilliard (G361 of 1987)* [1988] 79 ALR 554. The facts herein does not disclose that there has been a final judgment on any issues here or other related civil suits on issue estoppel as *res judicata*.

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- a* The question of what is *res judicata* has been appropriately set out in the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 where Peh Swee Chin FCJ at p. 791 described it as follows:
- b* What is *res judicata*? It simply means a matter adjudged and its significance lies in its effect of creating an *estoppel per rem* judication. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words the parties should accept it as the truth; *res judicata pro-veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest res publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
- c*
- d* It is also pertinent to note that the Supreme Court held that there are two kinds of *estoppel per rem judication* – namely cause of action *estoppel* and issue *estoppel*.
- e* The cause of action *estoppel* prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue *estoppel* prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.
- f*
- From the Supreme Court decision aforesaid it becomes clear that issue *estoppel* means an issue which a party is estopped from raising in a subsequent proceeding.
- g* After carefully considering the submissions and authorities proffered by the respective counsels for the 1st and 2nd plaintiffs and the defendants I have come to the conclusion that issue *estoppel* as *res judicata* applies in this case.
- As was aptly put by Shaik Daud Ismail JCA in *Lim Oh & Ors v. Allen & Gledhill* [1998] 4 CLJ 667 at p. 671:
- h*
- For issue *estoppel* to apply it was not necessary for the issue to be decided on its merits. Once a point is distinctly put in issue and determined and a judicial decision is final on that point, then it ought not to be allowed to be ventilated in a fresh or new suit.
- i*

Turning to the facts of the case herein it is my judgment that the order of the Court of Appeal in O.S. 1141 of 1997 given on 22 September 2000 that the 1st plaintiff in her capacity as beneficiary of the estate and/or as director of the 3rd plaintiff have no capacity to interfere in matters concerning the management of the 3rd plaintiff and the earlier court order dated 17 August 1991 in Suit No. 195 of 1991 whereby the court refused *inter alia* to restrain the 1st defendant from managing the assets of the 3rd plaintiff had adjudicated and disposed of with finality the issue herein of whether or not the plaintiffs have any say in management matters of the 3rd plaintiff.

In the light of my finding of issue estoppel the plaintiffs' counsel submission that there must be a final judgment on the issues before *res judicata* applies must surely fail. As was stated by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 at 565:

... in respect of issue estoppel the question is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality.

Though the Federal Court of Australia in *Schlieske's* case held that if there is only an interlocutory decision both in form and substance there can be no estoppel nevertheless that case cannot be cited for the proposition that *res judicata* has no application in every interlocutory decision. What is of importance is the determination of whether the decision in question is a final one on the merits or the issue in dispute. In point of fact Beaumont J in *Schlieske's* case acknowledged that there is no hard and fast rule in the application of *res judicata* principles in interlocutory decisions when he stated at p. 574:

It is true that, in some cases what may appear to be an interlocutory decision is in truth a final one.

Again the plaintiffs' submission that they are entitled to obtain the relief on the ground of changed circumstances even though the court may have earlier refused or dissolved the injunction based on the decision in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 2 MLJ 109 is untenable for the simple reason that the circumstances have not changed. The 1st defendant ever since the institution of Suit No. 195-1991 in 1991 was in his capacity as managing director of the 3rd plaintiff in a position to deal with the Towry Law's funds on behalf of the 3rd plaintiff and his status up to date has not changed to necessitate a similar *ex parte* application nine years later.

a As it is, the history of the plaintiffs' conduct of shopping and going from judge to judge is highly improper but what makes it deplorable is the manner of making the *ex parte* application herein without even making proper disclosure of the previous unsuccessful applications.

b Hence issue estoppel clearly operates against the 1st and 2nd plaintiff herein.

Issue Of Director's Duties - Whether Directors Can Bring The Action

The 1st defendant's submission under this head is that in law the 1st plaintiff has no *locus* as director of the 3rd plaintiff to claim interest in the assets of the company and relies on the Supreme Court decision of *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120.

c The 1st and 2nd plaintiffs in relying on the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 contend that as director the 1st defendant is a trustee and since a director can be held accountable if he misapplies the assets the rationale for preservation of the assets of the 3rd plaintiffs through the injunction restraining 1st defendant becomes self-evident.

d The issue relating to the liability of directors in *Lian Keow's* case was whether as director he was under a fiduciary duty to exercise his powers and control over the company's affairs in the interest of the company. The complaint against the director in that case was that he acted wrongfully and in breach of his duty as director of the company in procuring the execution of the charge. The Supreme Court in holding that there was breach of the fiduciary duty owed to the company to act in its best interest adopted the principle established in *Belmont Finance Corporation v. William Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 which principle appeared at p. 405 thereof:

e A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the Company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co.* (1894) 1 Ch. 616 at 631, 638, per Lindley and Kay LJJ.) So if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they came into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.

f Though the aforesaid case seems to suggest that directors are trustees nevertheless on a close scrutiny the trusteeship position arises if they abuse their fiduciary duty by misapplying the company's funds.

There is a stark difference between the fiduciary duty and fiduciary relationship of a director *vis-a-vis* the company. In the context of the difference aforesaid a director's fiduciary duty to the company does not tantamount to him being a trustee of the company. Support for the proposition aforesaid is found in the case of *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 where Rommer J had this to say:

It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading.

Thus in the context of the present case the decision in *Lian Keow's* case is inapplicable. The issue in its proper perspective is whether the 1st and 2nd plaintiffs can initiate the action herein in their capacity as directors in the face of the various earlier orders of court dated 3 February 1993 in O.S. No. 72-1993 and 27 September 2000 in O.S. No. 1141 of 1997 which expressly prevents them from bringing the action. Though the injunction may be for the altruistic purpose of preserving the 3rd plaintiff's assets nevertheless the ultimate victim would be the 3rd plaintiff company who would invariably be deprived of the utilisation of its core funds for its business. In the absence of evidence of malfeasance and/or misapplication of funds the hands of the officers of the 3rd plaintiff company who are responsible for the management of the company should not be tied to the detriment of the operations of the company.

Thus by reason of the previous court orders which are still valid and subsisting the 1st and 2nd plaintiff's incapacity is self evident to prevent the plaintiffs from the injunctive relief *qua* directors.

Having considered the various issues raised aforesaid I shall now advert to the applicable principles in the approach to be adopted by the courts in the granting or refusing of interlocutory injunction as laid down by the Court of Appeal decision in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293.

Applying the principle so established and directing myself in the manner as stated in *Keet Gerald Francis Noel's* case and evaluating the affidavit evidence and the submissions made by respective counsels it is my judgment that the 1st and 2nd plaintiffs have failed to satisfy the three requirements so established by the Court of Appeal.

- a* The question of serious question has been negated by the consent order dated 1 March 1992 in Suite 195-1991 where in agreeing that the present suit awaits the disposal of the said suit, the plaintiff have acknowledged that there are no serious questions to be tried in this suit as the real or underlying dispute is in Suit 195 of 1991 aforesaid.
- b* Since there are no serious questions to be tried, on that score alone the injunction herein ought to be set aside and I need not embark upon the second and third stages of inquiry namely where the justice of the case lies and whether damages are an adequate remedy.
- c* Even if I were to embark upon an inquiry as to the balance of convenience and justice it would still be in the defendants' favour. This is because no matter which way one looks at it the subject matter of the injunction herein are the core assets of the 3rd plaintiff company and hence it would be detrimental to the 3rd plaintiff company for it to be unable to utilise the funds for its business just because of the plaintiffs apprehension or misapprehension that there may be misapplication of the funds by the defendants. In the absence of cogent evidence (and none exists here) the defendants who are both *de jure* and *de facto* directors of the 3rd plaintiff as officers of the company should not have their hands tied in the management of the company and its funds. The balance of justice in the light of my finding of serious abuses of process, material non-disclosure and the operation of the principles of *res judicata* would clearly tilt in the defendants' favour.
- e*

- As regards the question on whether damages are an adequate remedy the subject matter being funds of a quantified sum speaks for itself. It should be observed and emphasised that there is no evidence and in fact there is no challenge on the defendants' ability to meet any claim for damages. On the contrary the defendants have challenged the plaintiffs' undertaking as to damages and the failure to provide any evidence of their ability to meet the undertaking gives rise to the question of their credibility to honour the untested and illusory undertaking given.
- f*
- g*

- Taking all the aforesaid consideration in mind I disallowed the plaintiffs' application in encl. 14 in respect of the *inter partes* injunction with costs and allowed the defendants' application in encl. 24 to set aside the injunction obtain *ex parte* on 17 October 2000 as varied on 25 October 2000 with costs.
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The plaintiffs subsequent to my orders aforesaid applied orally for an Erinford injunction. I heard oral arguments by both counsel and refused the application.

The refusal is predicated on the exhaustive deliberation and findings made by me on the various issues raised which does not warrant the *status quo* to remain pending appeal.

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